STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday, February 4, 2005
(9:15 am - 12:30 and 1:00 - 5:00 pm)

SF–State Bar Office
180 Howard Street
9 th Floor – Admissions Dept.
San Francisco, CA 94105

(Note: Per notice sent on Feb. 2, 2005, the meeting was relocated to the Judicial Council's Conference Center,Third Floor, Redwood Room, Hiram W. Johnson State Office Building, 455 Golden Gate Avenue, San Francisco, CA 94102)

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; Stanley Lamport; Kurt Melchior; Ellen Peck Hon. Ignazio Ruvolo; Jerry Sapiro; Mark Tuft; Paul Vapnek; and Tony Voogd.

MEMBERS NOT PRESENT: JoElla Julien; and Raul Martinez.

ALSO PRESENT: Jonathan Arons (BASF Liaison); Jim Biernat (COPRAC Liaison); Carol Buckner (Western State University); Randall Difuntorum (State Bar staff); Sid Kanazawa (Litigation Section, LA); Diane Karpman (Beverly Hills Bar Association Liaison); Robert Kehr (LACBA member); Joseph Lundy (ALAS); Lauren McCurdy (State Bar staff); Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission & LACBA Liaison); Peter Stern (T&E Section, Exec. Committee); Becky Stretch (ABA Joint Committee on Lawyer Regulation); Bob Wallach (Litigation Section); and Charles Wolff (T&E Section, Exec. Commitee Liaison).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE AUGUST 27 & 28, 2004 & OCTOBER 8, 2004 MEETINGS

The draft action summaries were deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

In an effort to expedite the Commission's work, the Chair encouraged members to: (1) submit assigned drafts in a timely fashion; (2) e-mail comments as early as possible before the eve of a meeting; and (3) refrain from repeating previously e-mailed comments when oral remarks are made at a meeting.

The Chair welcomed ABA Special Counsel Becky Stretch and invited her to address the Commission. Ms. Stretch indicated her high regard for the Commission's work which she has monitored through the e-list and the website postings and she noted that it is expected that states may not act to adopt the entirety of the ABA Model Rules, as state variation is a common practice. Ms. Stretch called attention to ABA resources available to assist the Commission, including background information on the ABA Ethics 2000 recommendations and ABA website links to rule amendment studies being conducted throughout the country.

B. Staff's Report

Staff reported on written comments submitted to the ABA Task Force on Attorney-Client Privilege by COPRAC and the State Bar Business Law Section Corporations Committee.

Staff also noted that the Commission's 2004 accomplishments was submitted to the Board of Governors Regulation, Admissions and Discipline Committee but that no feedback has been received.

III. MATTERS FOR ACTION

A. Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re Impaired Clients) [ABA MR 1.14]

The Chair summarized the background of the Board of Governor's referral of T&E Legislative Proposal 2005-02. The Chair welcomed T&E Section representatives Mr. Stern and Mr. Wolff. Ms. Foy presented a January 13, 2005 memorandum reporting on the codrafters' analysis of the proposal. The Chair first called for discussion of whether the issues of concern identified by the proponents necessitated a change in the law. The Chair explained that if there is a consensus that existing law is inadequate or unclear, then discussion would turn to the issue of whether a statutory change, a rule change, or some combination might be the best approach to explore. Among the points raised during the discussion were the following.

(1) A key concern raised is the issue of disclosure of client confidential information and the recent addition of Business and Professions Code § 6068(e)(2) and CRPC 3-100 support the proposition that a change in the law is needed to allow lawyers to reveal information that presently is not permitted to be disclosed.

(2) At least since 1996, the 5,600 members of Trust and Estates Section have held a consensus view that a change in the law is necessary, specifically an abrogation of the duty of confidentiality that permits action to protect the interests of elder and impaired clients. Lawyers should not be placed in the untenable position of having to violate an ethical duty and risk State Bar discipline and malpractice exposure in order to protect clients.

(3) The undisputed fact that the ABA has a rule addressing these issues, MR 1.14, and that California has inconsistent ethics opinions on these issues, lend strong support for the Commission's due consideration of appropriate reforms.

(4) The change in the law urged by the proponents fits the Commission's charge and is amplified by the fact that one of the Commission's objectives is to recommend rule amendments that are forward-looking. The population of elders and impaired persons is growing in California and the ethical issues to be encountered with increasing frequency by lawyers who represent this segment of Californians must be addressed by the Commission.

(5) This particular proposed change in the law actually reflects a significant departure from California's historical view of professional responsibility because it would change the dynamic of the total client commitment model of the CRPCs. In general, client autonomy is undermined when rules transfer client authority to the client's lawyer. The Commission should be careful in reaching any conclusion that there is no principal in existing law that might accommodate the proponent's desired reform. The CRPCs operate in harmony when they are built on the common foundation of the longstanding total client commitment model and there is a greater risk of unintended consequences if rules are added that represent a contrary philosophy.

(6) The concept of impliedly authorized disclosure of confidential information can be interpreted to be consistent with a total client commitment model; however, an exception to confidentiality that gives effect to a countervailing policy interest arguably is not.

Next, on the assumption that a change in the law is needed, the Chair called for a discussion of whether the Commission should endorse a statutory change, a rule change, or a combination approach similar to the collaborative process mandated by AB 1101. Among the points raised during the discussion were the following.

(1) The T&E Section's longtime interest in this area has included thorough consideration of all of the different approaches. Some of these attempts at reform are seen in the various Conference of Delegates proposals for amendments to the RPCs or the State Bar Act. In

consideration of the recent successful implementation of the AB 1101 policy through complementary amendments to the State Bar Act, the Evidence Code, and the RPCs, the T&E Section believes that both a statutory and rule change should be pursued. One of the virtues of the AB 1101 approach was that the time-frame imposed by legislation, passed with a delayed operative date, assured that a rule amendment was drafted and adopted without undue delay.

(2) There are at least two reasons why the AB 1101 process should not be regarded as the ideal methodology for addressing this matter. First, the subject of confidentiality is too critical to be dealt with in a piecemeal fashion. For example, a financial harm exception for impaired clients needs to be reconciled with the concept of a financial harm exception for all clients, including corporate clients. California regulators must tackle head-on the absence of a confidentiality rule like MR 1.6 by facing the challenge of a comprehensive treatment of confidentiality. Second, the issue of confidentiality is but one part of the multi-pronged problems faced by lawyers representing impaired clients. There are equally important issues of loyalty and conflicts that cannot be handled by a surgical strike on confidentiality.

(3) The T&E Section is not the only proponent of reform on this matter. There are other groups who support a legislative solution and its likely they will proceed on that path unless there are clear signals that the State Bar is assuming a leadership role and is serious about taking timely action. These other proponents witnessed the implementation of AB 1101 and understandably do not want to miss an opportunity in Sacramento to pursue an initiative that would be lobbied as follow-up legislation.

(4) As drafted, the T&E Section proposal incorporates the definition of "significantly impaired capacity" found in the probate code. This aspect of the bill reveals the inherent problem of a statutory approach that is focused on the State Bar Act. The probate code includes due process protections omitted in the proposal. In California, due process has been held to include confidential communications with lawyers. It is not just elders who are potentially affected. The concept of the proposal must account for the impact on criminal defendants, juveniles and others who have a due process right to confidential lawyer communications. The apparent policy of the proposal is a default acceptance of a lawyer's substituted judgment (Probate Code §§ 2580 et seq.) but without any provision for due process implications.

(5) Unlike MR 1.14, the T&E Section proposal is intended to be more protective of clients because it does not permit a lawyer to initiate a conservatorship proceeding. If MR 1.14 is viable despite due process concerns, then the more conservative T&E Section proposal should not be regarded as fundamentally flawed.

(6) The Commission and the T&E Section should jointly consider what is needed in both statutes and rules. This should be done promptly or else the State Bar could be relegated to the posture of reacting to another groups' proposal. However, because the substantive

scope of the reform involves criminal defendants, juveniles and others, both the Commission and the T&E Section need to outreach to other experts to assure that all relevant bases are covered.

Following discussion, the Commission discussed the following suggested course of action: (1) the Commission will consider the subject matter encompassed within the legislation; (2) the Commission will report to the Board of Governors that the Commission has reviewed the T&E Section proposal but does not recommend that any legislation go forward at this time; and (3) that the Commission's subcommittee will work with T&E Section representatives and other stakeholders (e.g., criminal law section, etc.) to identify the other areas and rules that are implicated by the issues to be addressed by a rule, or a statute, or both.

The Chair sought consensus on the foregoing course of action with two votes: the first vote asked whether the Commission should recommend against State Bar sponsored legislation at this time and the vote was 7 yes, 1 no, 1 abstain; the second vote asked whether the Commission should proceed to act on the subject matter of the T&E Section proposal by assigning the Commission's subcommittee to work with relevant stakeholders and develop a recommendation for amendments to rules, statutes or both and the vote was 8 yes, 0 no, 1 abstain. In accordance with the votes, the Chair assigned the subcommittee to proceed with a comprehensive study.

[Intended Hard Page Break]

B. Law Firm Definition (previously considered as part of proposed new rule 1-310X and proposed amended rule 2-200)

Mr. Tuft presented a January 18, 2005 memorandum responding to comments on a proposed single definition of the term "law firm" for purposes of the rules. It was emphasized that the definition would be a working definition that could be reconsidered and modified as needed. The Chair called for discussion of the definition and the proposed commentary. Among the points raised during the discussion were the following.

(1) The policy issue posed by a proposed law firm definition is whether the focus should be on describing specific forms of practice or on the conduct of lawyers that justifies designation as a law firm. The profession should regulate lawyers not the forms or entities by which lawyers practice.

(2) Another policy issue is whether the proposed definition should track the definitions used in other states.

(3) A process issue is whether a definition should be deferred until the end of the Commission's work.

(4) The concept of a law firm should be distinct from a mere association of lawyers. For example, a "strategic alliance" is not a law firm. There are other elements beyond the fact of an association to practice law.

(5) The definition should capture the idea of "lawyers practicing law together" and should strive to avoid the type of confusion that arose in connection with the application of RPC 2-200 and the debate over *de facto* associates.

(6) If there is no clear advantage in using other language, then the Commission should stay close to the ABA language.

(7) It should be understood that the proposal to have an enhanced law firm definition is in no way a step towards the regulatory practice of "discipline of law firms."

(8) Disc. [2] is intended to clarify that solo practitioners who share office space are not a law firm. The consequence of being categorized as a law firm depends on the particular rule that uses the term law firm. It could mean that consent is or is not required for a fee split or it could mean that a conflict is or is not vicariously imputed.

(9) The concept of partnership by estoppel should be in the rule text and not just in the discussion commentary.

(10) If a law firm definition is contextual, then that militates against a global definition.

(11) To the extent there are nuances and subtleties in the text of the law firm definition, the discussion commentary should give guidance needed to practitioners. For example, a practitioner may or may not read the term “partnership” as including a partnership by estoppel.

Following discussion, votes were taken to ascertain the Commission’s consensus for further work on a law firm definition. The Commission decided to implement a working definition at this time and not postpone the matter (7 yes, 1 no, 0 abstain). The Commission decided to tentatively approve Mr. Tuft’s draft as the working definition (6 yes, 3 no, 0 abstain). Regarding the discussion commentary, the Commission decided to include Disc. [2] (6 yes, 2 no, 1 abstain); include Disc. [3] (7 yes, 1 no, 0 abstain), and include Disc. [4] (6 yes, 1 no, 1abstain). It was suggested that the codrafters should use “1.0" as the tentative rule number for the law firm definition.

[Intended Hard Page Break]

C. Counterpart to Rule 1-310X [ABA MR 5.1/5.4] re Lawyers Influencing Lawyers

The Commission considered a September 20, 2004 proposal from Mr. Ruvolo recommending a version of MR 5.1 that expressly addresses the issue of law firm compensation arrangements that interfere with a lawyer's professional independent judgment. Mr. Tuft offered a November 15, 2004 counterproposal that would address concerns about law firm compensation arrangements in a discussion comment to a California version of MR 5.1. Mr. Tuft's proposal also included changing the term "non-lawyer" in rule 5.4 (1-310X) to "person," and changing the title of rule 5.4 (1-310X) to "Maintaining Professional Independence of a Lawyer." The Chair first called for a discussion of the concept of a California version of MR 5.1, with consideration of Mr. Ruvolo's addition of paragraph (d) to be considered next. Among the points made during the discussion were the following.

(1) California has no direct counterpart to MR 5.1 and the concept of the rule is important as a regulatory matter because so many lawyers practice in firms where the issue of supervision and law firm policies are critical to the professionally responsible delivery of legal services. If the practice of law was dominated by sole practitioners, then the need for 5.1 would not be so great.

(2) This rule is a step in the direction of law firm discipline and the Commission must be very careful to avoid inadvertent consequences. The use of a "reasonable" standard also suggests a simple negligence test that is not appropriate for a State Bar disciplinary rule.

(3) The policy of this rule is management accountability. Adoption of the rule would give an incentive to partners and principles to treat the supervision of subordinates and the development of firm policies with appropriate seriousness.

(4) To the extent that the rule would establish direct duties on supervisors for their own personal conduct in management activities, the rule is not that remarkable. However, the degree of vicarious liability present in the rule is problematic and somewhat unprecedented as a disciplinary concept (i.e., compare RPC 3-310).

(5) The essential concept of the rule may be flawed to the extent that it assumes that a partner with seniority possesses certain management authority. The facts of the *EEOC v. Sidley Austin* case (age discrimination base on the demotion of older partners) raises questions about the law firm paradigm upon which the rule appears to be based.

Following this discussion, a vote was taken to ascertain the Commission's interest in pursuing the concept of MR 5.1. The Commission decided to adopt the concept of a California version of MR 5.1 (6 yes, 2 no, 0 abstain).

Next, the Chair called for discussion of Mr. Ruvolo's specific recommendation to adopt paragraph (d) of his September 20, 2004 draft concerning compensation arrangements. Among the points raised during the discussion were the following.

(1) Paragraph (d) likely represents the most pervasive form of interference with independent judgment and should be a prominent part of the text of a rule and not obscured in any discussion commentary.

(2) As independence of professional judgment is the interest to be protected, the prohibition set forth in paragraph (d) could be included as part of the text, not comment, of rule 5.4 rather than rule 5.1 which is more narrowly focused on affirmative supervision obligations.

(3) The actual harm to be avoided is a law firm culture that often forces lawyers to either: take on so many matters that competence is compromised; or over-bill the clients that they are handling. These issues are real and a response is needed.

(4) To the extent that the harms to be avoided are essentially rule violations in and of themselves (e.g., failure to act competently or unconscionable fees), rule 5.1 is the appropriate concept because it imposes culpability on supervising lawyers and management by establishing an independent duty for those lawyers to deal with the effects of law firm compensation arrangements. As this is but a subset of the larger rule 5.1 concept, a well-crafted discussion comment might be sufficient to explain this application of the rule.

Following this discussion, the Commission took votes to ascertain consensus on proposed paragraph (d). A motion to include paragraph (d) in the text rule 5.1 was defeated by a vote of 4 yes, 5 no, 0 abstain. A motion to add discussion commentary to rule 5.1 along the lines of paragraph (d) was passed by a vote of 8 yes, 1 no, 0 abstain. For the next meeting, the codrafters were assigned to draft the language for the discussion commentary.

[Intended Hard Page Break]

(D) Consideration of Rule 5.4. Professional Independence of a Lawyer (aka Rule 1-310X)

Mr. Tuft presented Draft No. 6 of proposed rule 5.4 [1-310X] dated November 19, 2004. As indicated in connection with rule 5.1, Mr. Tuft recommended changing the term "non-lawyer" to "person," and changing the title to "Maintaining Professional Independence of a Lawyer." The Chair called for discussion of these points and related comments sent by e-mail. Among the points raised during the discussion were the following.

(1) Changing the rule title used in Draft No. 6 to delete reference to “non-lawyers” will avoid confusion about the source of outside interference with professional independent judgment. The concept of the rule is intended to cover outside interference from any person, including lawyers and non-lawyers.

(2) Replacing “non-lawyer” with “person” in paragraph (d) would track the revised title and also avoid confusion.

(3) The changes to the title and to paragraph (d) do not resolve the problem in paragraph (b) (2) concerning the list of persons eligible to receive payment of the purchase price for the law practice of a deceased attorney. The most direct fix is to change the list of eligible recipients (i.e., to include an attorney in fact).

(4) If the title is to be changed, then consideration should be given to including the fee split concept in the title as that is a key part of the rule and under the existing RPCs, it is a standalone rule.

Following this discussion, the Commission took votes to ascertain consensus on recommended changes to rule 5.4. A motion to change “non-lawyer” to “person” in rule 5.4(d) was adopted by a vote of 7 yes, 0 no, 1 abstain. A motion to reference fee splits in the rule title was defeated by a vote of 2 yes, 4 no, 2 abstains. A motion to change the title of rule 5.4 to “Duty to Avoid Interference With the Lawyer's Professional Independence” was adopted by a vote of 6 yes, 1 no, 1 abstain. A motion to tentatively approve rule 5.4 as modified (with the understanding that the codrafters were authorized to implement language necessary to address the 5.4(b)(2) concern about eligible recipients) was adopted by a vote of 6 yes, 1 no, 1 abstain. The Chair requested a mail ballot procedure to confirm all of the language changes discussed and adopted.

[Intended Hard Page Break]

E. Consideration of Rule 3-120 [ABA MR 1.8(j)]. Sexual Relations With Client

The Commission considered a November 24, 2004 memorandum from Mr. Ruvolo analyzing an August 24, 2004 comment on RPC 3-120 submitted by COPRAC. Mr. Ruvolo indicated that COPRAC recommends abandoning the current RPC and implementing a more prohibitive standard. The Chair called for discussion of whether the concept of the current rule should be maintained. Among the points raised during the discussion were the following.

(1) COPRAC's stricter approach to sexual relations would bring the legal profession in line with the standard applicable to psychiatrists and, as a matter of public confidence, likely would improve the reputation of lawyers. The policy of COPRAC's stricter approach also is consistent with OCTC's recommendation to simplify the rule.

(2) In many office environments the standard for supervisor - subordinate sexual relations is an absolute ban.

(3) Psychiatrists must deal with the phenomenon of patient transference and this makes their relationships distinct from the relationship that lawyers have with clients.

(4) Due consideration should be given to conforming to MR 1.8(j) as that is a bright line standard.

(5) MR 1.8(j) is not as clear as it might seem. RPC 3-120 is a clearer standard to the extent that it includes a definition of sexual relations.

(6) While the COPRAC and the ABA approach offer the appeal of brevity and simplicity, the actual standard appears to be more susceptible to constitutional challenge than RPC 3-120.

(7) Public perceptions do not necessarily equate with public confidence and there is no empirical evidence that a stricter rule is needed on these issues.

(8) The Commission must be careful not to initiate confusion by pursuing changes to RPC 3-120 that are inconsistent with the existing statute, Business and Professions Code section 6106.9, which is substantially similar to the current rule. At present, the only variation between the two provisions is that the statute adds that sexual relations are prohibited if such conduct would be likely to damage or prejudice the client's case. Perhaps, the only change that the Commission should make is to modify RPC 3-120 to make it identical to the statute.

Following the discussion, the Commission took votes to ascertain consensus on possible changes to RPC 3-120. A motion to maintain RPC 3-120 (and effectively reject the COPRAC and OCTC comment to materially change the rule) was adopted by a vote of 5 yes, 1 no, 1 abstain. A motion to modify RPC 3-120 to include the additional language in

the statute was adopted by a vote of 7 yes, 0 no, 0 abstain. A motion to change “member” to “lawyer” throughout the rule failed by a vote of 4 yes, 4 no, 0 abstain. In addition to the foregoing action, the Commission agreed that the working rule number should be “1.8.1" or some other rule number that is not obscured within MR 1.8. With these amendments, the rule was deemed tentatively approved with the proviso that the Chair may conduct a mail ballot to confirm the changes to be implemented by the codrafters.

[Intended Hard Page Break]

F. Consideration of Rule 3-210 [ABA MR 1.2(d)]. Advising the Violation of Law

The Commission considered a November 15, 2004 memorandum from Mr. Tuft enumerating identified rule amendment issues. Mr. Tuft introduced the rule and its policy basis. The Chair called for discussion of the issues and consensus votes were taken as follows.

Regarding issue #1, there was a consensus that the subject matter of the rule is a core principle that warrants prominence as a separate rule and should be designated as rule 1.2.1 or given another separate rule number.

Regarding issue #2, by a consensus vote of 7 yes, 1 no, 0 abstain, the Commission adopted the codrafters recommendation that the rule prohibit both counseling and assisting a client in criminal conduct.

Regarding issue #3, the codrafters withdrew the recommendation to replace the existing "actual knowledge" standard with an "ought to know" standard.

Regarding issue #4, by a consensus vote of 6 yes, 1 no, 0 abstain, the Commission decided that the rule should cover conduct that would be considered a violation of a "court order."

Regarding issue #5, the Commission deferred to the codrafters to attempt to draft discussion commentary clarifying that the rule is not intended to prohibit an attorney from counseling a client about the legal consequences of the client's proposed conduct.

Regarding issue #6, the following language was proposed:

> "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is fraudulent or is a violation of any law, rule, or ruling of a tribunal, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law, rule or ruling of a tribunal."

By a consensus vote of 9 yes, 0 no, 0 abstain, the Commission adopted the recommended language. (Note that the inclusion of the last "the" in the last line of this language was ratified by separate consensus vote of 8 yes, 1 no, 1 abstain.) It was understood that the codrafters would add language to the discussion commentary clarifying that a contractual obligation is not "law" within the meaning of this rule.

Regarding issue #7, the codrafters were asked to draft discussion commentary aimed at covering the Restatement § 94(2) issue of intent. The codrafters were assigned to prepare a revised draft for the next meeting.

G. Consideration of Rule 3-110 [ABA MR 1.1]. Failing to Act Competently

Mr. Vapnek presented a January 19, 2005 draft of a proposed amended rule on competence. The proposal would renumber RPC 3-110 as rule 1.1. Paragraph (a) of the proposed rule would incorporate MR 1.1. Paragraph (b) and the discussion commentary would incorporate RPC 3-110(B) and paragraph (c) would bring in language from former RPC 6-101(B). The Chair called for a general discussion of the codrafters' proposal to combine MR 1.1 with RPC 3-110. Among the points raised during the discussion were the following.

(1) By deleting the RPC 3-110 language concerning "intentional, reckless or repeated" conduct, the proposed rule appears to establish a negligence standard.

(2) The RPC 3-110 standard requires, in some cases, a finding of repeated conduct and this may be too difficult to track for vigorous disciplinary enforcement.

(3) A discussion commentary could clarify expressly that simple negligence does not result in a violation of the rule. Such a comment would be very helpful to the average practitioner.

(4) A rule that sends a message that lawyer negligence is okay does not further the goal of confidence in the legal profession. At the same time, a rule that makes simple negligence a State Bar offense is not practicable and could interfere with excusable neglect motions.

(5) California case law has set the standard for competence violations and the rule language should be drafted to be consistent with the existing cases that cover: acts of gross negligence/moral turpitude; intentional acts; repeated negligent acts; acts that demonstrate a reckless disregard of competence.

(6) If the existing rule works fine, then substantial revisions are not needed and may result in confusion and unintended consequences. The medical board will discipline physicians for negligence and the modifications to RPC 3-110 should not move in that direction.

(7) Use of the existing definition of competence is the most straightforward way to perpetuate the policy of the current rule.

(8) Adequate time is an important consideration in assessing competence, particularly at the point of client intake and this is not captured in the RPC 3-110 definition of competence.

(9) Another issue with the current definition of competence is the inclusion of the concept of "diligence" as this concept is a separate rule in the Model Rules.

(10) The application of the rule to referrals is unclear and should be addressed.

Following discussion, the Chair took consensus votes to give drafting guidance to the codrafters. First, the Commission voted in favor of retaining the concept of the current definition of competence, RPC 3-110(B), by a vote of 7 yes, 0 no, 0 abstain. Second, the Commission voted in favor of keeping the precise language of RPC 3-110(A), limiting the

rule to only intentional, reckless and repeated conduct, by a vote of 5 yes, 4 no, 0 abstain. Third, the Commission voted in favor of using paragraph (C) of the proposal by a vote of 6 yes, 4 no, 0 abstain. Lastly, the Commission voted in favor of using discussion comment [3] of the proposal by a vote of 4 yes, 0 no, 2 abstain. In taking this action, it was understood that the codrafters were assigned to address the following open issues: concept of "adequate time;" inclusion of "diligence" (and related points in the OCTC comment); and guidance on the application of the rule to referrals.

For the next meeting, the codrafters were assigned to prepare a revised draft rule and to submit a recommendation on MR 1.3.

[Intended Hard Page Break]

H. Consideration of Proposed New Rule or Amended Rule Prohibiting a Request or Agreement to Waive the Attorney-Client Privilege and the Relationship of Such a New Rule to Rule 3-110 (Agenda Item III.G Above)

The Commission considered a January 17, 2005 memorandum from Mr. Melchior on a proposal for a new rule prohibiting a request or agreement to waive the attorney-client privilege. The Chair raised the issue of the ABA's pending study of the attorney-client privilege and staff reported that both COPRAC and State Bar Business Law Section Corporations Committee have provided comment to the ABA's task force. Ms. Stretch indicated that the Commission should monitor the ABA website for a summary of the testimony and written comment submitted to the task force. At the suggestion of the Chair, the Commission agreed to defer any further exploration of a new rule until the ABA Task Force issues a report and recommendations on its study.

[Intended Hard Page Break]

I. Consideration of Rule 3-300 [ABA MR 1.8(a)]. Avoiding Interests Adverse to a Client

The Commission considered a September 24, 2004 memorandum from Mr. Lamport presenting the following RPC 3-300 amendment issues: (1) transactions outside the intended scope of the rule; (2) the definition of adverse pecuniary interest under the *Fletcher v. Davis* case; and (3) proposed clarification of the application of the rule to agreements for advanced fees. The Chair called for discussion of the issues and consensus votes were taken as follows.

Regarding transactions outside the scope of the rule, it was recommended that the rule be clarified by adding language along the lines of State Bar Formal Op. No. 1994-141 in order to assure that rule is not misapplied to lawyer-client transactions that do not implicate the trust and confidence that a client reposes in a lawyer. It was also acknowledged that dual professions and ancillary services are distinct practices. On a proposal to retain current RPC 3-300, with the proviso that the codrafters could propose discussion commentary based on State Bar Formal Op. No. 1994 141, the Commission voted in favor by a vote of 7 yes, 0 no, 0 abstain. It was also agreed that the rule number would be rule 1.8.1 with the sex with client rule numbered 1.8.2.

Regarding the definition of adverse pecuniary interest under the *Fletcher v. Davis* case, the following options were outlined: (1) simply add a citation and brief explanation in the commentary; (2) seek to overrule the broad *Fletcher* definition of adverse pecuniary interest with specific proposed rule amendments accompanied by an explanatory report to the Board/Supreme Court; or (3) create an opportunity for the Supreme Court, itself, to overrule the broad *Fletcher* definition of adverse pecuniary interest by clarifying the interaction between RPC 3-300 and 4-100 and demonstrating that the strong prophylaxis of RPC 3-300 is unnecessary given the protections afforded under RPC 4-100. Following brief discussion of these options, the Commission voted to authorize the codrafters to explore options that would place before the Supreme Court the issue of overruling *Fletcher v. Davis* (5 yes, 2 no, 1 abstain). It was understood that if the Commission ultimately decides not to proceed with putting this matter at issue, then discussion commentary would be added to the rule that would simply cite and explain *Fletcher*.

Regarding proposed clarification of the application of RPC 3-300 rule to agreements for advanced fees, the codrafters sought the Commission's support and authorization to draft discussion commentary addressing this concern. There was no objection and the requested authorization was deemed granted. It was understood that the related issue of modification of fee agreements should also be addressed by the codrafters. The Chair indicated that general fee agreement disclosure issues would not be taken up in connection with RPC 3-300 but that any interested Commission member was free to draft a proposal as a standalone matter or as part of the anticipated consideration of RPC 4-100 or RPC 4-200. Discussion of the comments by OCTC (including proposal to cover "attempts" and to require "informed" consent) were deferred until the next meeting to assure input from Ms. Yen .

In addition to the foregoing, the codrafters also were instructed to prepare a report and recommendation on MR 1.8 (d), (i) and (k) after completion of work on RPC 3-300.

[Intended Hard Page Break]

J. Consideration of Rule 3-200 [ABA MR 3.1 and 3.2]. Prohibited Objectives of Employment

This matter was briefly discussed to clarify the Commission's past action and current assignment to the codrafters. Mr. Mohr and staff indicated that at its November 19, 2004 meeting, the Commission voted to retain RPC 3-200 (as opposed to MR 3.1) as the starting point for any proposed amendments. Following this clarification, the Chair deferred further discussion until the codrafters have had an opportunity to reconsider the recommendation for amendments. It was suggested that the codrafters consider the *Zamos v. Stroud* case on the issue of continuing a representation.

[Intended Hard Page Break]

K. Consideration of Rule 2-200. Financial Arrangements Among Lawyers

Matter carried over.